Supreme Court, U.S.
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No. 98-805

In The

Supreme Court of the United States

October Term, 1998

WYMAN-GORDON FORGINGS, INC.,
AND WYMAN-GORDON COMPANY,

Petitioners,

v.

THE HONORABLE LAMAR McCORKLE, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Texas

BRIEF IN OPPOSITON

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QUESTION PRESENTED

Where the Occupational Safety and Health Administration released witness statements to defendants-petitioners, are they subject to discovery under Texas law?

PARTIES TO THE PROCEEDING BELOW

RELATORS/DEFENDANTS:
Wyman-Gordon Company
Wyman-Gordon Forgings, Inc.

DEFENDANT:
Cooper Cameron Corporation

RESPONDENT:
The Honorable Lamar McCorkle

REAL PARTIES IN INTEREST/PLAINTIFFS:
Melody Ann Nagy, Individually and as Administratrix of the Estate of Steven Armand Nagy, Deceased, and as Next Friend of Minors Nicholas Anthony Nagy and Jacob Armand Nagy; and Louis John Nagy and Theresa Carrol Nagy
Jerene Terry, Individually and as Personal Representative of the Estate of Donald Terry, Sr., Deceased; and Donald-Lewis Terry, Jr.; Michael Joseph Terry; Lena Terry Davis; and Audrey Terry
Mary Lightfoot, Individually and as Personal Representative of the Estate of Amos Carroll Lightfoot, Deceased; and Mark Lightfoot; Scott Lightfoot; and Rusty Lightfoot
Jimmy Galindo; Esther Galindo
Darrin Sweat; Shawna Sweat
Maria M. Uribe; Saul Uribe; and Enrique Uribe

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF PETITIONERS

Pursuant to this Court's Rule 29.6 the nonwholly owned subsidiaries of Wyman-Gordon Company are: Wyman-Gordon Composite Technologies, Inc.; Scaled Composites, Inc.; Western Australian Specialty Alloys, Pty. Ltd.; International Extruded Products, LLC; Wyman-Gordon Titanium Castings, LLC; and WGK AVISMA Titanium. In addition, Cooper Industries, Inc. owns 38 per cent of the outstanding shares of Wyman-Gordon Company stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF PETITIONERS iii

TABLE OF AUTHORITIES v

JURISDICTION 1

STATEMENT 2

A. Statement of Facts 2

B. Procedural History 2

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 3

I. THE TEXAS STATE COURT DECISION IS NOT FINAL 3

II. THE DECISION RESTS ON AN INTERPRETATION OF A TEXAS STATE STATUTE ON PRETRIAL DISCOVERY, WHICH IS AN INDEPENDENT AND ADEQUATE STATE GROUND 4

III. IF THERE IS ANY ISSUE OF FEDERAL LAW, THE TRIAL COURT CORRECTLY DECIDED IT 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Arceneaux v. State of Louisiana, 376 U.S. 336 (1964) 3

Herb v. Pitcairin, 324 U.S. 117 (1945) 5

North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156 (1959) 3

STATUTES

Freedom of Information Act, 5 U.S.C. § 552 7

Occupational Safety and Health Act, 29 U.S.C. § 658(c) 2, 5, 6

28 U.S.C. § 1257 ..... 1, 3, 4

RULE

Rule 166b(3)(c) of the Texas Rules of Civil Procedure 5

OTHER AUTHORITIES

ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO, AND KENNETH S. GELLAM, SUPREME COURT PRACTICE (7th ed. 1993) § 3, 21 at 141 4

Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) 4

BRIEF IN OPPOSITION

Melody Ann Nagy, Individually and as Administratrix of the Estate of Steven Armand Nagy, Deceased, and as Next Friend of Minors Nicholas Anthony Nagy and Jacob Armand Nagy; and Louis John Nagy and Theresa Carrol Nagy; Jerene Terry, Individually and as Personal Representative of the Estate of Donald Terry, Sr., Deceased; and Donald-Lewis Terry, Jr.; Michael Joseph Terry; Lena Terry Davis; and Audrey Terry; Mary Lightfoot, Individually and as Personal Representative of the Estate of Amos Carroll Lightfoot, Deceased; and Mark Lightfoot; Scott Lightfoot; and Rusty Lightfoot; Jimmy Galindo; Esther Galindo, Darrin Sweat; Shawna Sweat; Maria M. Uribe; Saul Uribe; and Enrique Uribe, Plaintiffs-Respondents, file this their reply to the Petition for a writ of certiorari to review the judgment of the Texas Supreme Court in this case.

JURISDICTION

An order of the Texas Supreme Court was entered on October 15, 1998. No petition for rehearing was submitted to the court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, however, the defendants-petitioners' own writing demonstrates there is no jurisdiction. The decision of which review is sought is not a final judgment or decree and does not dispose of an issue of federal law.

STATEMENT

A. Statement of Facts

The plaintiffs-respondents respectfully disagree with defendants-petitioners' Statement of Facts. The only record below is a hearing on a discovery proceeding in state court. There was no testimony taken by the court and the only "evidence" received supporting petitioners assertions was the affidavit of one of its lawyers, Matthew Hoeg. The Hoeg Affidavit has been made part of Petitioner's Application (Pet. App. 12a). Clearly, it is no more than argument of counsel.

The facts are simple. On December 22, 1996, eight men were killed in an explosion at Wyman-Gordon Forgings, Inc., Houston, Texas. The petitioners are the owners and/or operators of the facility where the explosion occurred. During the investigation of the event, representatives of the Occupational Safety and Health Administration ("OSHA") took numerous witness statements. Copies of the statements were given to defendants-petitioners.

B. Procedural History

In a state court action filed by the families of the dead and injured, the trial judge ordered that the statements possessed by petitioners in question were discoverable under Texas law. The defendants-petitioners sought a writ of mandamus to the intermediate court of appeals. The writ was denied without opinion. The defendants-petitioners then sought writ of mandamus to the Texas Supreme Court. The writ was denied without opinion.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE TEXAS STATE COURT DECISION IS NOT FINAL

Under 28 U.S.C. § 1257, Supreme Court review of state court decisions is available only with respect to "final judgments or decrees rendered by the highest court of a state in which a decision could be had." The rule of finality that is set forth in § 1257 is rooted in important considerations of policy: "[I]t avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs."[1]

This proceeding is so far from "final" that it can appropriately be said to be at the opposite end of the continuum. No trial has been concluded – trial has not even started. Indeed, defendants-petitioners are complaining about nothing more than a discovery motion. Obviously the precious resources of this nation's highest court cannot be squandered on discovery disputes.

Moreover, subsequent rulings of the trial court may attenuate all, or at least many, of the concerns of defendants-petitioners. The court may decide that none of the witness statements is admissible, or that they are

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[1] North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156, 1959. See also Arceneaux v. State of Louisiana, 376 U.S. 336 (1964).

admissible for only limited purposes such as impeachment. Or, the court may decide to redact large portions of the statements. All such possible variations can be argued by the parties and, if necessary, eventually appealed through the Texas appellate courts. Only then, if at all, could there possibly be a "[f]inal judgment[ ] or decree[ ] by the highest court of a state" so that a petition for certiorari would be within this Supreme Court's jurisdiction under 28 U.S.C. § 1257.

II. THE DECISION RESTS ON AN INTERPRETATION OF A TEXAS STATE STATUTE ON PRETRIAL DISCOVERY, WHICH IS AN INDEPENDENT AND ADEQUATE STATE GROUND.

If a state court proceeding rests on a determination of state law, "the Supreme Court has no jurisdiction to review the case."[2] Such judgments, as Justice Brennan once said, "not only cannot be overturned by, [but] indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such cases"[3] The constitutional basis for the Court's inability to review such state court judgments "is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power

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[2] ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO, AND KENNETH S. GELLAM, SUPREME COURT PRACTICE (7th ed. 1993) § 3, 21 at 141.

[3] Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977).

between the state and federal judicial systems and in the limitations of our own jurisdiction.[4]

This case, as defendants-petitioners' own writings make clear, involves nothing more than the interpretation of a Texas Rule of Civil Procedure.[5] Specifically, defendants-petitioners protest the trial court's decision to grant a motion to compel that was filed by plaintiffs-respondents in order to obtain certain witness statements. The statements were given by a number of individuals in the wake of a tragic industrial explosion that resulted in eight deaths and numerous injuries. The statements were given to officials of the Occupational Safety and Health Administration ("OSHA") which, in turn, gave the statements to defendants-petitioners. The issue that has divided the parties is whether these witness statements, in the hands of the defendants-petitioners, are discoverable. Plainly, if OSHA had wanted to limit the discoverability of these statements, it could have a) withheld them from all third parties, including defendants-petitioners, or, b) at the very least, joined in defendants-petitioners' opposition to the motion to compel. It did neither. In fact, OSHA is in no way involved in this state court discovery dispute, either as a party or witness.

Because the issue on which review is sought is purely one of state law, certiorari is not only unnecessary but also jurisdictionally impossible.

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[4] Herb v. Pitcairin, 324 U.S. 117, 125-26 (1945).

[5] Rule 166b(3)(c) of the Texas Rules of Civil Procedure.

III. IF THERE IS ANY ISSUE OF FEDERAL LAW, THE TRIAL COURT CORRECTLY DECIDED IT

There is no pending issue of federal law. No issue exists as to discovery from a federal agency or employee. As defendants-petitioners readily acknowledge, OSHA's investigation was completed in June, 1997 – 17 months ago. OSHA's "Field Inspection Reference Manual," to which defendants-petitioners cite, expressly provides that, "No duties, rights or benefits, substantive or procedural, are created or implied by this manual."

The OSHA Field Inspection Reference Manual demonstrates that defendants-petitioners' arguments about their "cooperation" with OSHA are ridiculous. Defendants-petitioners' cooperation was not tendered because of some vague and undocumented agreement, but rather because no employer has a right to object to sworn statement interviews. In fact, the interposing of an objection by an employer may be construed as a refusal of entry and/or interference with a compulsory process and dealt with accordingly by warrant and/or subpoena issued by a Federal Magistrate. The same authority is available to OSHA in obtaining interviews with employees.

The only possible "federal question" presented by this case, at this stage, is whether there is any aspect of federal law implicated by defendants-petitioners having to produce witness statements in their possession. The trial court evidently found none. OSHA has not submitted any writing to suggest that it believes any issue of federal law is at stake, and defendants-petitioners themselves can do no better than invoking "policy" arguments

and the language of the Freedom of Information Act upon which plaintiffs-respondents do even rely.

There was no error in the trial court's decision.

CONCLUSION

Because there is no final judgment or decree of which petitioner seeks review, because there is an independent and adequate state ground for the court's order, and because any possible issue of federal law was correctly decided, defendants-petitioners' petition for certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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REPLY BRIEF

Wyman-Gordon Forgings, Inc. and the Wyman-Gordon Company file this Brief in Reply to the Opposition filed by those respondents who are plaintiffs/real parties in interest in the Texas courts.

ARGUMENT

Rather than seriously contest any ground stated in the Petition, the respondents have raised two arguments against certiorari that may be briefly disposed of.

1. Respondents assert that the decision of the Texas Supreme Court is not "final" within the meaning of 28 U.S.C. § 1257(a). They are in error. Unless this Court grants review, the confidential transcripts of the witness statements taken by OSHA will be turned over to respondents. This act

would permanently destroy their confidentiality, contrarily to the assurances provided to petitioner by OSHA, and would damage the policies behind, and the effectiveness of, the federal investigatory privilege (Pet. at 6-7). As respondents appear to admit, in carefully chosen language, this damage could not be rectified by later holdings. Opposition at 3-4 (". . . [S]ubsequent rulings . . . may *attenuate* all, or at least many, of the concerns of the [petitioners]" (emphasis added)). The Harris County trial court shares the view that the injury from turning over the witness statements would be irreparable, as evidenced by its stay of its order requiring production to provide petitioner the opportunity to seek certiorari from this Court. Pet. 5; Pet. App. 7a-8a.

In such circumstances, where under the decision of the highest court of a state the federal right asserted would be permanently lost absent review by this Court, that decision is final for purposes of certiorari. *E.g., South Dakota v. Neville,* 459 U.S. 553, 558 n. 6 (1983)(federal issue reviewable after decision of state supreme court because further proceedings ordered by that court would destroy any opportunity by petitioner to prevail upon the issue). Otherwise this Court would be powerless to correct the damage caused by the refusal of the Texas Supreme Court to grant relief.

2. The respondents also assert that the decision of the Texas courts rests upon an independent state-law ground (Opp. at 4-5). This claim is fundamentally in error. Petitioner argued to the Texas courts that a federal investigatory privilege protected the witness statements in petitioner's possession from discovery, just as those statements would be privileged if sought from OSHA. The Texas courts rejected that argument. The respondents seem to argue here that such a privilege does not exist unless OSHA claims it (Opp. at 5) and that accordingly only state-law issues are presented by the Petition. Respondents do not argue that an *alternative* state-law ground exists for the

decision, such that even if the federal privilege herein asserted were admitted to exist there would still be a ground under state law to require the documents in question to be produced. *Compare, e.g., Fox v. Muller,* 296 U.S. 207, 210 (1935). Instead, respondents' position is that the matter was decided below on the basis of state law because the federal privilege claimed by petitioner does not exist. But this Court is not deprived of jurisdiction to consider a question of federal law simply because a respondent asserts, or the court below found, that the federal claim lacks merit. Otherwise, this Court would be in the absurd position of being forced to determine the merits of a question before it could decide whether it had jurisdiction to grant certiorari. No such requirement exists. *Cf., e.g., Bell v. Hood,* 327 U.S. 678 (1946).

CONCLUSION

For these reasons and those stated in the Petition, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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